

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)	
)	
)	
v.)	Criminal No. 04-40002-NMG
)	
)	
JOSEPH DiFLUMERA)	
)	

**DEFENDANT’S MOTION TO STRIKE SURPLUSAGE FROM
FIRST SUPERSEDING INDICTMENT**

Defendant Joseph DiFlumera (“DiFlumera”) hereby moves the Court to strike the Additional Factors from the First Superseding Indictment in the event that it decides not to submit them to the jury for determination.

1. The First Superseding Indictment, returned on November 18, 2004, charges DiFlumera with the following: (1) Hobbs Act Extortion in violation of 18 U.S.C. § 1951; (2) Mail Fraud in violation of 18 U.S.C. § 1341; (3) Wire Fraud in violation of 18 U.S.C. § 1343; and (4) Interstate Travel in Aid of Racketeering Enterprises in violation of 18 U.S.C. § 1952.

2. In apparent reaction to *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004), the Government included in the First Superseding Indictment certain “Additional Factors” which alleged that DiFlumera: (1) “Committed an offense in which the loss exceeded \$800,000 as described in U.S.S.G. § 2B3.1(b)(7)(E); and (2) “Committed an offense involving an express and implied threat of death and bodily injury, as described in U.S.S.G. § 2B3.2(b)(1).”

3. The Supreme Court's decision in *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738, (2005), now appears to make those Additional Factors unnecessary.

4. If the Court does not submit the Additional Factors to the jury for determination, then the Additional Factors would thus be considered surplusage under Fed. R. Crim. P. 7.

WHEREFORE, DiFlumera respectfully requests that the Court strike the Additional Factors from the First Superseding Indictment in the event that it decides not to submit them to the jury for determination.

By his attorneys,

/s/ Paul V. Kelly
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